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FM AMEMBASSY JAKARTA
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INFO RUEHZS/ASSOCIATION OF SOUTHEAST ASIAN NATIONS PRIORITY
RUEHBK/AMEMBASSY BANGKOK PRIORITY 7685
RUEHML/AMEMBASSY MANILA PRIORITY 2985
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UNCLAS SECTION 01 OF 06 JAKARTA 000353

SIPDIS

SENSITIVE
SIPDIS

STATE FOR EAP/MTS, L/LEI FOR BUCHHOLZ
DOJ FOR CRIM AAG SWARTZ
DOJ/OIA FOR WARNER/ROBINSON
DOJ/OPDAT FOR ALEXANDRE/LEHMANN/CRAWFORD
BANGKOK FOR SONDERBY
MANILA FOR COLE

E.O. 12958: N/A

TAGS: [PREL](#) [PGOV](#) [KCRM](#) [KJUS](#) [CJAN](#) [KTIA](#) [ID](#)

SUBJECT: FIRST ROUND OF U.S.-INDONESIA MLAT NEGOTIATIONS

¶1. Summary. (U) On January 23-25, delegations from the U.S. and Indonesia met in Jakarta for a first round of negotiations aimed at conclusion of a mutual legal assistance treaty (MLAT) between the two countries. The discussions were friendly and productive. All participants agreed that an MLAT should add to, rather than complicate, existing law enforcement cooperation. The delegations exchanged information about their respective legal systems and mutual legal assistance practices, and then began working on draft text, using proposals that each delegation had prepared and shared prior to the negotiations. A thorough review of about a third of the text was completed. The delegations agreed that a second round of negotiations should occur this year in Washington. End Summary.

¶2. (U) The U.S. delegation consisted of representatives from State L/LEI, the Department of Justice's Office of International Affairs, Embassy Bangkok, and Embassy Jakarta. The Indonesia delegation was led by the Department of Foreign Affairs, and included representatives from the Attorney General's Office, the Ministry of Law and Human Rights, Interpol, the Financial Transaction Reports and Analysis Center, the Indonesian National Police and the Department of Immigration. Separately the two delegations (and Charg) met briefly with the Attorney General of Indonesia, who offered his support for the negotiations.

Indonesia Legal System

¶3. (SBU) At the U.S. request, Indonesia's delegation made a presentation on its legal system and its practices with respect to mutual legal assistance. Indonesia has a civil law system inherited from the Dutch, under which law is mainly governed by statutes. In the criminal law field, the two main statutes are the Penal Code and the Code of Criminal Procedure, although various other statutes have been enacted to address specific crimes such as terrorism, money laundering, and corruption. These specific statutes include both substantive offense definitions and procedural provisions, such as, for example, creation of special courts or provisions to allow for introduction of electronic evidence. Indonesia explained that, where a specific law conflicts with a more general law such as the criminal procedure code, the more specific law controls. They further explained that this would be true of a ratified treaty as well - if Indonesia ratified a mutual legal assistance treaty with a particular country, its provisions would supersede any contrary provision contained in Indonesia's general mutual assistance law. (Note: This is an important point, as there are provisions in Indonesia's mutual assistance law that would pose significant

problems for the United States, as noted below. Indonesia suggested that its Law on International Treaties would clarify and confirm this point. Post will obtain an English translation of that law for the U.S. delegation. End Note)

14. (U) Under normal Indonesia criminal procedure, the police will begin an investigation of a crime based on specific, known charges and a suspect. Where no suspect has yet been identified, the police can undertake a "preliminary investigation," which is still part of a criminal proceeding. The police will create a dossier, the primary contents of which are summaries of witness statements prepared by police investigators. Once the dossier is complete, it is given to a prosecutor who reviews it and, if he agrees it is complete, presents it to a court. If the judge believes there is sufficient evidence, he will order the dossier "admitted," which amounts to requiring the defendant to appear at trial. Only five kinds of evidence are recognized under the criminal procedure code: witness statements, expert statements, documents, a defendant's testimony, and "indication," loosely equivalent to circumstantial evidence. The judge plays an active role in questioning witnesses at trial. At the end of trial, a prosecutor will recommend a sentence in addition to arguing for a conviction. The judge decides guilt and sentence at the same time; a person can be found guilty only if there are two forms of evidence and the judge also believes the person is guilty. The prosecutor is then responsible for executing the sentence.

15. (U) With respect to mutual legal assistance, Indonesia's practice is now governed by the Mutual Assistance in Criminal Matters Law of 2006, although previously Indonesia provided assistance on the basis of reciprocity. The mutual assistance law spells out procedures to be followed, the types of assistance that can be granted, and reasons for refusing requests. Indonesia's delegation indicated that, for the purpose of treaty negotiations, while its proposed treaty is based on its law, it is not bound by

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any of these provisions. Rather, so long as Indonesia law does not prohibit it, a treaty may add any practice or procedure, in particular so long as it advances the principles of Indonesia's criminal procedure code (one of which is efficiency). Indonesia has mutual assistance treaties with Australia and China, has signed but not ratified treaties with Korea and ASEAN, and will soon sign a treaty with Hong Kong.

16. (SBU) When a mutual assistance request is received, the various agencies with responsibility for executing such requests will meet under the auspices of the Department of Foreign Affairs. They collectively determine whether and how the request should be executed. For example, if a request is at the investigative stage, it will be executed by the police, because the police handle investigations in Indonesia. In general, requests will be executed according to the procedures in the mutual assistance law.

17. (SBU) The U.S. delegation, in reviewing the mutual assistance law, found several potential problems which were discussed. For example, the law speaks of assisting in "investigations," but that is a term of art in Indonesia (as noted above, a formal stage of the process). The U.S. delegation described the grand jury process in the United States and Indonesia's delegation expressed confidence that it was sufficiently similar to Indonesia's investigations and/or preliminary investigations that it would be able to provide assistance. Similarly, the law seems not to contemplate being able to compel a witness to testify for a foreign state's proceeding, but Indonesia's delegation clarified that, if a court order is needed because a witness refuses to testify voluntarily, either the police or prosecutors can obtain one, and that the police also have the authority to compel witnesses to testify if necessary. The delegation further clarified that, under its mutual assistance law, Indonesia can collect evidence on behalf of a foreign country even if it could not use the same kind of evidence itself - for example, electronic evidence in a case that did not involve one of the specific crimes for which electronic evidence is admissible in Indonesia. The U.S. delegation will continue to explore such issues in connection with specific types of assistance contemplated under the treaty.

¶18. (U) Prior to commencing an article by article review, the delegations made general presentations about their proposed drafts. Indonesia noted that its text was based on its act and on its prior treaties, including most notably the ASEAN MLAT. In describing the treaty, it focused particular attention on articles relating to recovery of proceeds of crime, making it quite clear that this concept was of paramount importance from Indonesia's point of view. The U.S. delegation highlighted three themes that run through its proposed text: the creation of broad, open-ended obligations to provide assistance with limited bases for refusal; the creation of a partnership of "central authorities" - the experts on either side that are to engage in constant consultation to help ensure effective execution of requests; and the goal, achieved through various specific textual requirements, of ensuring that the result of a mutual assistance request is the provision of admissible evidence. With those themes in mind, the U.S. delegation briefly identified and highlighted key provisions of each article in the treaty.

¶19. (U) The delegations agreed to consider issues by looking at both drafts simultaneously. Indonesia's delegation prepared a chart containing both proposed texts and a column for "agreed text." All agreements that were reached were, of course, subject to further consideration, and the delegations agreed that the text would later be reviewed for consistency.

Article by Article Review

¶10. (SBU) In the preamble, the delegations discussed the U.S. proposal to include the word "prevention" of crime as one of the objectives of the treaty. Indonesia questioned whether that encompassed training and other types of general cooperation. The U.S. delegation clarified its intent to cover assistance for crimes that might not yet be complete, such as with respect to a terrorist plot or the activities of an organized criminal group. Indonesia's delegation agreed to the concept, but expressed concern about the translation into Indonesian of the word "prevention." The delegations agreed to use the word "suppression" instead. The delegations also agreed to omit a specific reference, sought by

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Indonesia, to the confiscation of criminal proceeds as being a goal of the treaty, recognizing that it is covered in depth in a specific article.

¶11. (SBU) In Article 1 ("scope of assistance"), the delegations discussed the scope of matters for which assistance would be available. The delegations agreed that the MLAT is for criminal law enforcement purposes and the authority conducting an investigation must be competent to do so in the context of law enforcement (for example, legislative investigations would not be covered), but that specific language regarding the jurisdiction of the investigating authority was not necessary - it would be up to the requesting state to ensure it did not submit requests where there was no competent authority. The delegations also agreed that "proceedings related to criminal matters" would include administrative and regulatory investigations where a criminal referral is possible, such as by the Securities and Exchange Commission or in tax cases, as well as civil forfeiture actions connected with criminal conduct and grand jury proceedings.

¶12. (SBU) The delegations were in general agreement on the types of assistance to be covered. They clarified that evidence, including testimony, could be compelled where necessary. They agreed that the MLAT would not be used to obtain general "information," which was more properly obtained through informal cooperation. And they agreed that, in addition to listed types of assistance, the treaty should cover any other form of assistance not prohibited by domestic laws, regardless of whether it is specifically mentioned in the treaty. With respect to two forms of assistance - arranging for people to travel across borders to give evidence and asset forfeiture - the delegations recognized that they did not yet have a

meeting of the minds on the appropriate scope of such assistance and agreed to come back to the descriptive language after discussing the details in connection with later articles.

¶13. (SBU) The delegations began a discussion of the issue of "dual criminality," as the U.S. draft has a provision requiring assistance regardless of whether the conduct at issue would be criminal in the requested state. Indonesia expressed a desire to reflect in the treaty the provision of its law that allows discretion to refuse an assistance request if there is no dual criminality. The U.S. delegation explained the importance of being able to obtain assistance for investigations of a wide variety of offenses that are often not criminalized in other countries. Indonesia acknowledged that it did not always have comparable laws - for example, with respect to computer crime - but that it would take a broad view of a request and tend to grant it if there were a general crime (e.g., fraud) that broadly described the conduct at issue. Indeed, the Indonesian delegation indicated it had no experience of denying a request based on lack of dual criminality, but that if the treaty did not reflect the discretion to do so it could pose problems in the ratification process, as it would appear the United States were obtaining special treatment. The U.S. delegation indicated the importance of having certainty that certain crimes would be covered, and suggested potential consideration of a "list" approach. Indonesia did not like the list approach, but indicated it would consider the issue further and propose language at the next session.

The U.S. delegation also asked for an explanation of the difference in Indonesia's mutual assistance act between two articles (6c and 7a) that each appear to address dual criminality. Indonesia's delegation was unable to articulate a true difference between the two provisions. The U.S. delegation further described why a dual criminality restriction is less applicable to the mutual legal assistance situation than to extradition, and the sides agreed to consider the matter further at the next round.

¶14. (SBU) In the context of the dual criminality discussion, the delegations described some crimes of importance and reviewed whether they were covered under respective laws. Indonesia indicated its priorities were terrorism, financial crimes (including bribery, corruption, money laundering, bankruptcy, and fraud), narcotics, and trafficking in persons, all of which are adequately covered under U.S. law. In addition to these, the U.S. asked about financing of terrorism, environmental crimes, antitrust, securities offenses, tax offenses, export controls, corporate crimes, intellectual property, explosives, immigration, piracy, obstruction of justice, and conspiracy and other inchoate offenses, all of which Indonesia indicated were adequately covered. Some questions were raised about two important areas - computer crime and racketeering - both of which Indonesia felt could largely be covered under general laws. In both areas, however, further discussion appeared to reveal gaps

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in coverage (for example, with respect to computer crime, it did not appear any general law would cover the intentional dissemination of a computer virus or worm).

¶15. (SBU) Finally, on Article 1 the delegations agreed that the treaty would not cover defense requests, and that the U.S. language setting that out was acceptable. Indonesia also agreed it did not require a territorial provision in the treaty. Both sides agreed the treaty would cover the entire territory of the respective countries.

¶16. (SBU) The delegations discussed Indonesia's proposal that the treaty have a "non-application" article. The U.S. delegation expressed its view that such articles are not customary and would raise questions about other things not listed in the article. The U.S. further pointed out that one of the items on the list - enforcement of criminal judgments - appeared to contradict the intent of both sides with respect to forfeiture judgments. Indonesia agreed to consider this further.

¶17. (SBU) The delegations next discussed an article on the impact of an MLAT on other types of cooperation ("other assistance" or "compatibility with other arrangements"). The delegations expressed

at length their mutual desire to ensure that an MLAT does not undermine existing law enforcement cooperation which occurs outside of treaty channels. Indonesia's Interpol representative reiterated on many occasions that assistance could continue to be obtained via direct police to police contacts. The delegations agreed that the purpose of the treaty was to create a mechanism for obtaining admissible evidence - a goal over and above the types of informal cooperation that already occur - and that, for example, it would not require use of the treaty if the police in one country simply wanted to see a document that the police in the other country had. The delegations agreed on the U.S. text for the article, and agreed to discuss later its placement in the treaty (it was article 3 in the Indonesia draft and article 17 in the U.S. draft).

¶18. (SBU) Concerning the article on "central authorities," although there were few disputes over language, it was clear that the two sides had different approaches to the concept. For the U.S., the central authority (Justice's Office of International Affairs) has an active role in the preparation of outgoing requests and the execution of incoming requests, and the U.S. seeks similar partners in other countries. But Indonesia's central authority is the Ministry for Law and Human Rights, and Indonesia described that agency's role as, essentially, chairing the interagency meeting to decide what to do about requests. The real work, both with incoming and outgoing requests, would be done by the Attorney General's Office and/or the police. The U.S. delegation tried many ways to convince Indonesia to attempt to streamline the process further, but Indonesia explained that its police and prosecutors were part of different agencies and that it needed the interagency coordination because of divisions of authority. Indonesia did indicate, however, that its police and especially prosecutors were able to have direct contact with central authorities in other countries with respect to particular requests and would continue to do so. In light of the Indonesia position, the parties agreed to language expressing the role of the central authority as "processing" requests. The U.S. agreed to Indonesia's proposed language regarding the process for changing a central authority, and encouraged Indonesia to consider such a change.

¶19. (SBU) A similar problem prevented agreement on language regarding the role of the diplomatic channel. The U.S. prefers eliminating the diplomatic channel from MLAT requests, viewing that as one of an MLAT's primary advantages over letters rogatory. Indonesia expressed the view that its act requires it to maintain the option of communicating through the diplomatic channel. The U.S. delegation indicated that option was always available, whether or not the treaty said so, as governments could always communicate through their foreign ministries if they so choose. Indonesia indicated that the language should remain bracketed for now.

¶20. (SBU) Most of the article on the content and form of requests was identical or close to identical in the respective drafts. As is customary, the draft provides that requests will be made in writing, but both sides agreed that, given the distance between the countries, it would be appropriate to incorporate the possibility of electronic transmission of requests, so long as the authenticity of requests could be verified (for example, by a follow-up phone call, or perhaps through electronic signature technology). The delegations agreed that translations would not routinely be

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required, but that sometimes a request would need to be translated into Indonesian in order to be executed in Indonesia, and that the United States would commonly provide a translation if requested in such a circumstance.

¶21. (SBU) With respect to the contents of requests, the delegations could not agree on two items - whether they would include information on the subject of an investigation (the U.S. indicated such information was often provided in practice but should not be required, as it suggests that the identity of the subject might be deemed relevant for determining whether to execute a request) and whether a "court order relating to the assistance requested" should be included. On the latter point, the U.S. delegation expressed its concern about the provision of Indonesia's mutual assistance law regarding search warrants. The law seems to require a requesting

state to obtain its own warrant for a search in Indonesia and forward a copy of that warrant to Indonesian authorities for execution, a process that would be impossible in the United States, as a court would not issue such a warrant for a search outside its jurisdiction. Indonesia indicated it would have to reflect further on this problem. The delegations did indicate, however, that there might be some types of court orders that would be required to be included in an assistance request, such as a forfeiture order that a state wanted enforced.

¶22. (SBU) The U.S. delegation sought confirmation, with respect to the contents of requests, that the list that the two sides had agreed and would put in the treaty would supersede the requirements of Indonesia's mutual assistance law, which provides that certain items (not included in the draft treaty text) "must" appear in a request. Indonesia's delegation confirmed that Indonesia would look to the treaty for the specific requirements with respect to a particular country, and that the act provided only general guidelines.

¶23. (SBU) In the article on "limitations on assistance," one of the more important issues from the U.S. point of view is whether the chapeau of this article includes the word "shall" (as in Indonesia's draft) or "may." The U.S. delegation explained that the purpose of the treaty is to create an obligation to provide assistance, not an obligation to refuse assistance. The discretionary word "may" always leaves open the option of denying assistance, but also leaves open the possibility that assistance would be granted even in a case in which a ground for refusal appears to apply. The U.S. pointed out that the UN model treaty and all but one of existing U.S. treaties use discretionary language, even with countries that have laws similar to Indonesia's. The Indonesia delegation indicated that it understood the U.S. arguments, but that it was not yet comfortable ignoring the provisions of its law on this question, and that the issue should remain bracketed.

¶24. (SBU) With respect to specific grounds for refusal, the U.S. expressed its preference for a short list, in keeping with the overall theme of the treaty to promote assistance. Both sides quickly agreed on limitations for political offenses, military offenses (that are not ordinary crimes), and petty crimes (because the treaty is to be used for serious offenses). Both sides also agreed to U.S. language allowing refusal of requests when they tread upon a state's "essential interests," a term that the U.S. delegation defined as amounting primarily to interests of a constitutional dimension. In this respect, the U.S. delegation made clear that it would not be able to provide assistance in the investigation of certain crimes in Indonesia's penal code that amount to speech crimes - criticizing the President or a religion, defamation or libel, etc. - because of the First Amendment. Nor would the U.S. be able to assist in debtor cases. Indonesia indicated it had never invoked a similar clause in its draft treaty. The delegations also agreed to a U.S. proposal that requests "not in conformity with the treaty" could be denied, as this is often useful in addressing defense attorney requests, and to an Indonesia proposal that politically-motivated requests could be denied. With respect to two other grounds that had been in the Indonesia draft - assurances regarding limitations on use of evidence and interference with ongoing investigations in the requested state - the delegations agreed that they should be considered in different contexts but not as bases for refusal.

¶25. (SBU) The delegations agreed to bracket for further consideration language on double jeopardy. Both delegations indicated that it was possible in each country to prosecute the same conduct under different types of offenses without running afoul of double jeopardy provisions, and that the issue was the offense, not

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the conduct. The U.S. delegation pointed out that the particular charges (offenses) might not be known at the time of a request for assistance, so that it would not make sense to deny a request on the ground that the offense had already been prosecuted. The delegations considered various scenarios in which an assistance request might be made, including when a crime affected victims in both countries and each country wanted to prosecute the offender.

Indonesia's delegation indicated it would have to give further thought to the issues. Indonesia's delegation did acknowledge that the language of its proposed provision was redundant in covering "pardons" as well as convictions, as it explained that under Indonesian law, one cannot be pardoned until after one is convicted.

¶26. (SBU) Finally, the delegations agreed to include language reaffirming that bank secrecy or the presence of fiscal matters are not bases to refuse a request, and furthermore that before any grounds of refusal are invoked, the central authorities would consult to determine if assistance can nonetheless be granted. In addition, the delegations agreed that the central authorities would be expected to provide reasons for any refusal of assistance.

Next Steps

¶27. (U) At the conclusion of the third day of negotiations, the two sides, at the request of Indonesia, signed a "record of discussion" prepared by Indonesia's delegation that generally reflects the intentions of the two sides and attaches a copy of the text as agreed to date. The two delegations expressed their mutual desire to continue the discussions in Washington, where they will proceed to analyze the remaining articles. The U.S. delegation pointed out that there are issues to be considered by each side in advance of such negotiations, and that direct contact in the interim might be appropriate as well.

¶28. (SBU) One of the issues that was touched upon tangentially but not explored in detail was the role of Sharia law in Indonesia. While the Indonesia delegation indicated that Sharia law is separate from the penal code, they did acknowledge that, in some regions in particular, Sharia law crimes are prosecuted by state officials. This is an issue that delegations will need to fully explore in a second round.

¶29. (U) This cable was drafted by the U.S. delegation to the negotiations.

PASCOE